

April 15, 2020

Via ECF

Hon. Nicholas G. Garaufis
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Pellegrino, et al. v. New York State United Teachers, et al.
Civ. Case No. 2:18-cv-3439(NGG)(RLM)
Our Case No. 263067-F100

Dear Judge Garaufis:

Union Defendants submit this letter to bring to the Court's attention controlling authority from the Court of Appeals, Second Circuit issued today in Wholean v. CSEA SEIU Local 2001, __ F. 3d __, No. 19-1563-cv (2d Cir. Apr. 15, 2020), which addresses the core issue in the Rule 12(b)(6) motion submitted on June 6, 2019. In Wholean, the Second Circuit affirmed the application of the good faith defense as a matter of law to a public sector union against claims for refund of agency fees paid prior to Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018). In doing so, the Second Circuit reaffirmed its decision in Jarvis v. Cuomo, 660 F. App'x 72, 75 (2d Cir. 2016), and held it was objectively reasonable for the union to rely on Supreme Court precedent and then-valid statutes. Wholean, at p. 8-9. The Second Circuit further noted that "nothing in Janus suggests that the Supreme Court intended its ruling to be retroactive...Even if the retroactivity of Janus is presumed, no different outcome is warranted. A good-faith defense would still preclude the relief Appellants seek." Id. at 9-10. Based on the Second Circuit's decision, and the overwhelming and uniform application of the good faith defense to public sector unions for pre-Janus agency fees, Union Defendants' motion to dismiss the Complaint should be granted.

Respectfully submitted,

ROBERT T. REILLY

By: /s/ Michael J. Del Piano
Michael J. Del Piano
Of Counsel

MJD/hs

cc: All counsel (by ECF and e-mail)

In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2019

No. 19-1563-cv

KIERNAN J. WHOLEAN AND JAMES A. GRILLO,
Plaintiffs-Appellants,

LAKEISHA CHRISTOPHER,
Plaintiff,

V.

CSEA SEIU LOCAL 2001; BENJAMIN BARNES, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE OFFICE OF POLICY AND MANAGEMENT, STATE OF CONNECTICUT; SANDRA FAE BROWN-BREWTON, IN HER OFFICIAL CAPACITY AS UNDERSECRETARY OF LABOR RELATIONS, STATE OF CONNECTICUT; ROBERT KLEE, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, STATE OF CONNECTICUT,
Defendants-Appellees,

KEVIN LEMBO, IN HIS OFFICIAL CAPACITY AS COMPTROLLER, STATE OF
CONNECTICUT,
Defendant.

1 On Appeal from the United States District Court
2 for the District of Connecticut

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5 ARGUED: DECEMBER 12, 2019

6 DECIDED: APRIL 15, 2020
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9 Before: CABRANES and LOHIER, *Circuit Judges*, and REISS, *District*
10 *Judge*.^{*}
11

12 In this appeal, Plaintiffs-Appellants Kiernan J. Wholean and
13 James A. Grillo contend that the United States District Court for the
14 District of Connecticut (Eginton, J.) improperly dismissed their First
15 and Fourteenth Amendment claims brought pursuant to 42 U.S.C.
16 § 1983 to obtain repayment of fair-share union fees collected pursuant
17 to controlling precedent. Because we hold that a good-faith defense
18 applies to Appellees' collection of fair-share union fees, we **AFFIRM**
19 the District Court's dismissal of Appellants' Second Amended
20 Complaint.

21
22 JEFFREY D. JENNINGS (Milton L. Chappell, *on*
23 *the brief*), National Right to Work Legal

^{*} Judge Christina Reiss, of the United States District Court for the District of Vermont, sitting by designation.

1 Defense and Education Foundation, Inc.,
2 Springfield, VA, *for Plaintiffs-Appellants*.

3 SCOTT A. KRONLAND (P. Casey Pitts,
4 Altshuler Berzon LLP, San Francisco, CA;
5 Daniel E. Livingston, Livingston, Adler,
6 Pulda, Meiklejohn & Kelly, P.C., Hartford,
7 CT, *on the brief*), Altshuler Berzon LLP, San
8 Francisco, CA, *for Defendant-Appellee CSEA*
9 *SEIU Local 2001*.

10 CLARE KINDALL, Solicitor General (Philip
11 Miller, Assistant Attorney General, *on the*
12 *brief*), *for William Tong, Connecticut*
13 *Attorney General, for State Defendants-*
14 *Appellees*.

15

16 CHRISTINA REISS, *District Judge*:

17 Plaintiffs-Appellants Kiernan J. Wholean and James A. Grillo
18 contend that the United States District Court for the District of
19 Connecticut (Eginton, J.) improperly dismissed their First and
20 Fourteenth Amendment claims brought pursuant to 42 U.S.C. § 1983
21 against Defendants-Appellees CSEA SEIU Local 2001 (“Local 2001”);
22 Benjamin Barnes, Secretary of the Office of Policy and Management for
23 the State of Connecticut; Sandra Fae Brown-Brewton, Undersecretary
24 of Labor Relations for the State of Connecticut; and Robert Klee,

1 Commissioner of the Department of Energy and Environmental
2 Protection for the State of Connecticut (collectively, “Appellees”). We
3 hold that a good-faith defense applies to Appellees’ collection of fair-
4 share union fees from Appellants and therefore AFFIRM the District
5 Court’s dismissal of Appellants’ Second Amended Complaint.

6 I. BACKGROUND

7 Appellants Kiernan J. Wholean and James A. Grillo are
8 employees of the State of Connecticut. Appellee Local 2001 is a union
9 that represents State of Connecticut employees. The remaining
10 Appellees are State of Connecticut officials.¹

11 On June 13, 2018, Appellants, who are not members of Local
12 2001, filed a Complaint against Appellees, asserting that they were
13 forced to pay fair-share union fees to Local 2001 as a condition of their
14 employment in violation of the First Amendment to the United States
15 Constitution. Appellees admit that they collected fair-share fees from
16 Appellants, but contend they were entitled to do so under applicable
17 law. During the pendency of Appellants’ lawsuit, the United States
18 Supreme Court decided *Janus v. American Federation of State, County,*
19 *and Municipal Employees (“AFSCME”), Council 31*, 138 S. Ct. 2448 (2018)
20 wherein it overruled *Abood v. Detroit Board of Education*, 431 U.S. 209

¹ Although Appellants appealed the entirety of the District Court’s decision and judgment in their notice of appeal, in their brief they abandon their appeal of the District Court’s dismissal of their claims against the State of Connecticut officials. *See* Appellants’ Br. at 3 n.1 (“[Appellants] also sued certain officials of the Connecticut state government but they do not appeal the [D]istrict [C]ourt’s dismissal of their claims against the State Defendants.”).

1 (1977), to hold that the collection of fair-share fees from public-sector
2 employees violated the First Amendment because they “forced [non-
3 members] to subsidize a union, even if they choose not to join and
4 strongly object to the positions the union takes in collective bargaining
5 and related activities,” thereby “compelling them to subsidize private
6 speech on matters of substantial public concern.” *Id.* at 2459-60.

7 After *Janus* was decided, Appellees ceased deducting fair-share
8 fees from Appellants’ pay and refunded any such fees collected post-
9 *Janus*. Thereafter, Appellants amended their Complaint to seek the
10 return pursuant to 42 U.S.C. § 1983 of all fair-share fees collected by
11 Appellees pre-*Janus* allegedly in violation of the First and Fourteenth
12 Amendments to the United States Constitution.

13 On October 1, 2018, Appellees moved to dismiss the First
14 Amended Complaint, asserting a good-faith defense based upon their
15 compliance with Conn. Gen. Stat. § 5-280 (authorizing, among other
16 things, the collection of fair-share fees from non-members) and
17 directly controlling Supreme Court precedent that rendered the
18 collection of fair-share fees from non-consenting, non-waiving, non-
19 member public-sector employees lawful. *See Abood*, 431 U.S. at 235-36.
20 While the motion to dismiss was pending, Appellants filed a Second
21 Amended Complaint.

22 On April 26, 2019, the District Court dismissed the Second
23 Amended Complaint, finding Appellants’ claims for declaratory
24 judgment and injunctive relief were moot based on *Janus*. With regard
25 to Appellants’ assertion that Local 2001 continued to violate the First

1 and Fourteenth Amendments by retaining pre-*Janus* fees, the District
2 Court concluded those claims were barred by the defense of good-faith
3 adherence to existing precedent.

4 II. DISCUSSION

5 The Second Circuit reviews a district court's dismissal of a
6 complaint *de novo* using the same standard employed by the district
7 court. See *Purcell v. N.Y. Inst. of Tech. – Coll. of Osteopathic Med.*, 931
8 F.3d 59, 62 (2d Cir. 2019). Appellants urge this court to reverse on two
9 grounds.

10 First, Appellants contend that 42 U.S.C. § 1983 does not
11 recognize a good-faith defense beyond qualified immunity. They
12 assert one cannot be implied because a First Amendment violation
13 does not turn on a violator's motive and there is no analogous common
14 law tort from which a good-faith defense may be extrapolated.
15 Second, Appellants urge this court to find that Appellees should have
16 anticipated *Janus* and ceased collecting fair-share fees on that basis.

17 We hold that a party who complied with directly controlling
18 Supreme Court precedent in collecting fair-share fees cannot be held
19 liable for monetary damages under § 1983. In so holding, we do not
20 write on a blank slate. The Supreme Court in *Wyatt v. Cole*, 504 U.S.
21 158, 168 (1992), observed that “principles of equality and fairness may
22 suggest . . . that private citizens who rely unsuspectingly on state laws
23 they did not create and may have no reason to believe are invalid
24 should have some protection from liability, as do their government
25 counterparts.” Although the Court ultimately held that private

1 defendants are not entitled to qualified immunity, the Court refused
2 to “foreclose the possibility that private defendants faced with § 1983
3 liability . . . could be entitled to an affirmative defense based on good
4 faith and/or probable cause.” *Id.* at 169; *see also id.* at 168 (noting that
5 the interests underlying a good-faith defense “are not sufficiently
6 similar to the traditional purposes of qualified immunity to justify
7 such an expansion” of immunity to private parties). Indeed, in *Wyatt*,
8 several Justices opined that a good-faith defense for private
9 individuals who rely on precedent has always existed. *See id.* at 174
10 (Kennedy, J., concurring) (joined by Justice Scalia in finding “support
11 in the common law for the proposition that a private individual’s
12 reliance on a statute, prior to a judicial determination of
13 unconstitutionality, is considered reasonable as a matter of law”); *id.*
14 at 176 (Rehnquist, J., dissenting) (joined by Justices Souter and Thomas
15 in stating “it is clear that at the time § 1983 was adopted, there
16 generally was available to private parties a good-faith defense to the
17 torts of malicious prosecution and abuse of process”) (footnote
18 omitted).

19 Since *Wyatt*, every Circuit Court of Appeals to have considered
20 the question has held that a good-faith defense exists under § 1983 for
21 private individuals and entities acting under the color of state law who
22 comply with applicable law, including three circuits who have
23 concluded that a good-faith defense is available to unions that relied
24 on *Abood* and applicable state law in collecting fair-share fees prior to

1 *Janus*.²

2 Consistent with *Wyatt*, a 2016 panel of this court found “a good
3 faith defense was available to a private defendant sued under § 1983
4 for a First Amendment violation.” *Jarvis v. Cuomo*, 660 F. App’x 72, 75

² See, e.g., *Ogle v. Ohio Civil Serv. Emps. Ass’n*, 951 F.3d 794, 797 (6th Cir. 2020) (“A narrow good-faith defense protects those who unwittingly cross that line in reliance on a presumptively valid state law—those who had good cause in other words to call on the governmental process in the first instance.”); *Lee v. Ohio Educ. Ass’n*, 951 F.3d 386, 390-91 (6th Cir. 2020) (“[A] consensus has emerged among the lower courts that while a private party acting under color of state law does not enjoy qualified immunity from suit, it is entitled to raise a good-faith defense to liability under section 1983 [including for pre-*Janus* collection of fair-share fees.] . . . We now add our voice to that chorus.”) (citations and internal quotation marks omitted); *Danielson v. Inslee*, 945 F.3d 1096, 1097 (9th Cir. 2019) (“[j]oining a growing consensus” following *Janus* in holding that “private parties may invoke an affirmative defense of good faith to retrospective monetary liability under 42 U.S.C. § 1983, where they acted in direct reliance on then-binding Supreme Court precedent and presumptively-valid state law”); *Janus v. AFSCME*, 942 F.3d 352, 366 (7th Cir. 2019) (holding on remand that until the Supreme Court “said otherwise, AFSCME had a legal right to receive and spend fair-share fees collected from nonmembers as long as it complied with state law and the *Aboud* line of cases. It did not demonstrate bad faith when it followed these rules”); *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008) (holding that a towing company was entitled to assert a good-faith defense to a Fourteenth Amendment due process claim based on the lack of notice to a towed vehicle’s owner because “[t]he company did its best to follow the law and had no reason to suspect that there would be a constitutional challenge to its actions”); *Jordan v. Fox, Rothschild, O’Brien & Frankel*, 20 F.3d 1250, 1276 (3d Cir. 1994) (recognizing a good-faith defense under § 1983 for due process deprivations); *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993), *cert. denied*, 510 U.S. 977 (1993) (on remand from the Supreme Court, holding that “private defendants, at least those invoking ex parte prejudgment statutes, should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute’s constitutional infirmity”).

1 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017). In *Jarvis*, the lack of a
2 scienter element for a First Amendment violation did not defeat the
3 recognition of a good-faith defense because “unlike standard defenses,
4 affirmative defenses need not relate to or rebut specific elements of an
5 underlying claim.” *Id.* (citing Black’s Law Dictionary 482 (9th ed.
6 2009)). We find *Jarvis* well-reasoned. Because Appellees collected fair-
7 share fees in reliance on directly controlling Supreme Court precedent
8 and then-valid state statutes, their reliance was objectively reasonable,
9 and they are entitled to a “good-faith” defense as a matter of law. *See*
10 *Pinsky v. Duncan*, 79 F.3d 306, 313 (2d Cir. 1996) (“There is common
11 law authority that it is objectively reasonable to act on the basis of a
12 statute not yet held invalid.”); *Jarvis*, 660 F. App’x at 76 (affirming the
13 district court’s application of the good-faith defense because “CSEA
14 relied on a validly enacted state law and the controlling weight of
15 Supreme Court precedent,” and thus it was “objectively reasonable for
16 CSEA ‘to act on the basis of a statute not yet held invalid’”) (quoting
17 *Pinsky*, 79 F.3d at 313).

18 In finding a good-faith defense, we note that nothing in *Janus*
19 suggests that the Supreme Court intended its ruling to be retroactive.
20 Indeed, the *Janus* Court held that “States and public-sector unions *may*
21 *no longer* extract agency fees from nonconsenting employees,” *Janus*,
22 138 S. Ct. at 2486 (emphasis supplied), and the Supreme Court
23 reversed and remanded for further proceedings rather than apply its
24 new rule to the parties before it. *Cf. Harper v. Va. Dep’t of Taxation*, 509
25 U.S. 86, 90 (1993) (holding that the Supreme Court’s “application of a
26 rule of federal law to the parties before the Court requires every court

1 to give retroactive effect to that decision”). Even if the retroactivity of
2 *Janus* is presumed, no different outcome is warranted. A good-faith
3 defense would still preclude the relief Appellants seek.

4 Contrary to Appellants’ second argument on appeal, Appellees
5 cannot reasonably be deemed to have forecasted whether, when, and
6 how *Abood* might be overruled. Instead, they were entitled to rely on
7 directly controlling Supreme Court precedent, and in good faith, they
8 did so. See *Agostini v. Felton*, 521 U.S. 203, 207 (1997) (holding that
9 courts, and by extension citizens, should “follow the case which
10 directly controls, leaving to [the Supreme] Court the prerogative of
11 overruling its own decisions”).

12 III. CONCLUSION

13 We have reviewed all of the remaining arguments raised by
14 Appellants on appeal and find them without merit. For the foregoing
15 reasons, we **AFFIRM** the April 29, 2019 judgment of the District Court.